Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-960

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

HIGH TIDE SEAFOODS, *et al.*,

Appellants,

v.

STATE OF WASHINGTON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Appellees, State of Washington, et al., move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington Supreme Court. This motion is based on the failure of this appeal to present a substantial federal question, as well as jurisdictional deficiencies in the appeal.

STATEMENT OF THE CASE

High Tide Seafoods, a partnership composed solely of non-Indians, challenges the validity of Washington's tax on the possession of food fish for commercial purposes, as

applied to High Tide's possession of fish purchased from treaty Indians. We begin by briefly describing the tax and its application to High Tide. We then turn to a discussion of the nature of High Tide's claim and the treatment of that claim by the Washington Supreme Court. Finally, in the argument portion of this motion, we demonstrate that this appeal presents no substantial federal question.

A. WASHINGTON'S FISH TAX

Washington's fish tax is embodied in Chapter 82.27 Wash. Rev. Code.[1] It is a single excise tax uniformly imposed upon all businesses such as High Tide, which deal in fish for commercial purposes. The measure of the tax is the value of the fish, typically determined by the sales price. The rate of the tax is a statutorily stated percentage which varies only with the species of the fish. The tax applies at an equal rate and measure to all purchasers of fish for commercial purposes, without regard to the identity of the person from whom the fish are acquired. The legal incidence of the tax is the first possession by an owner for commercial purposes, after the fish have been landed. As the Washington Supreme Court ruled:

> * * * the owner whose first possession of the food fish constitutes the taxable event is liable for the tax. That person alone is responsible for the tax. * * * (J.S. App. 6)

Washington's fish tax also provides in Wash. Rev. Code § 82.27.020(2) that a person liable for the tax, such as High Tide, "may deduct" from the price paid to the person from whom the fish are acquired "an amount equal to a tax

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[1]Chapter 82.27 Wash. Rev. Code has been amended in several significant respects since the period involved in this case, *i.e.*, July 1, 1980 through March 31, 1983. To the extent those amendments have bearing on this case, they will be noted in this motion. Absent such notation, we describe the tax as it existed during the above referenced period for which High Tide seeks a refund.

at one-half the rate" levied by the statute.[2] In rejecting one of High Tide's various challenges to this tax on state law grounds—*i.e.*, that this provision constitutes an unlawful delegation of taxing authority, the Washington Supreme Court concluded that this provision of the statute entails no taxing authority at all, and instead merely recognizes an obvious economic reality, *i.e.*, that the parties liable for the tax may have the opportunity to pass on to their sellers part of the economic burden of the tax. J.S. App. 6. Of course, such a possibility would obtain with or without the statutory provision.

Of additional significance in considering Washington's fish tax is its purpose—furtherance of Washington's salmon enhancement efforts which benefit Indians, as well as non-Indians. Cf. *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985), *cert.denied* ____ U.S. ____; 88 L.Ed.2d 358 (1985).[3] (Hatchery fish are to be included in Indian entitlement.)

In 1977, the Washington legislature provided for the funding of a major salmon enhancement program. It did so by providing for the issuance of $31,500,000 of the State's general obligation bonds for the development of salmon hatcheries and related facilities. (chapter 308, Laws of 1977, 1st Ex. Sess.). The authorization was subsequently increased to $34,500,000 in two separate statutory amendments in 1980 and 1981. (chapter 15, § 1, Laws of 1980; chapter 261, § 1, Laws of 1981).

Under Wash. Rev. Code § 75.48.100, a prerequisite to the issuance of any such bonds is certification by the

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[2]High Tide suggests in its Jurisdictional Statement that:

> For purposes of this case, the most significant aspect of the tax is that the parties liable for the tax, fish purchasers, are allowed to deduct one-half of the tax from the price paid to the fishermen. J.S. 5.

As we will demonstrate, this provision actually is of no significance whatsoever in the context of High Tide's claim and rather, serves only to camouflage the true nature of that claim.

[3]High Tide's insinuation that the fish tax was amended in 1978 in order to disadvantage Indian fishermen has no support in the record of this case or in fact. J.S. 7.

Washington Department of Fisheries that on the basis of annual revenue estimates, receipts from license sales and salmon fees and taxes will be sufficient to service the debt represented by these bonds.

Quite simply, Washington's fish tax, together with the other statutorily specified receipts, is the true source for the financing of these bond issues. The bond issues, in turn, have funded the State salmon enhancement program—a program from which High Tide, as well as treaty Indians, benefit.[4]

B. HIGH TIDE'S CLAIM

High Tide is a Washington partnership, all of whose partners are non-Indians. High Tide is in the business of purchasing fresh salmon from fishermen, processing the fish and then, wholesaling it to third parties. High Tide purchases fish from both treaty Indians and non-treaty fishermen.

High Tide's essential claim in this appeal is that it is immunized from liability for Washington's fish tax, as applied to its possession of fish purchased from treaty Indians.

High Tide's claim was originally a more modest one. In administrative proceedings before the Department of Revenue, High Tide sought only a refund of one-half of the amount of the excise tax which it had paid upon purchases of fish from treaty Indians, on the theory that High Tide could not and had not attempted to deduct an amount equal to half of the tax from the purchase price paid to treaty fishermen. At the administrative level, then, High Tide did not challenge the entire tax. J.S. App. 14, 20.

In its action before the Thurston County Superior Court, High Tide expanded its claim, contesting the entire tax as applied to its possession of fish purchased from both

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[4]Currently, approximately $5,300,000 of the bonds remain authorized but unissued. Future issuance of these bonds would be jeopardized, absent this tax.

treaty Indian and non-treaty sellers. This challenge was based upon various state law grounds, rejected by the courts below. Additionally, High Tide continued to challenge the entire tax, on various federal grounds, and now seeks review of the decision of the Washington Supreme Court which rejected High Tide's federally based challenges.

The nature of High Tide's claim is perhaps obscured by High Tide's suggestion that alternative, "less burdensome" taxes, free of the "infirmity" which High Tide attributes to the fish tax, could be imposed upon fish purchasers. That "infirmity" is identified at page 8 of High Tide's Jurisdictional Statement, where High Tide asserts that the fish tax operates:

> * * * in a manner that either imposes the economic burden of half the tax on treaty Indian fishermen or makes it more expensive for fish purchasers to buy fish from treaty Indian fishermen than from their non-Indian counterparts.[5]

At page 17 of the Jurisdictional Statement, High Tide offers an alternative tax scheme. There, High Tide states:

> The State could divide the tax equally between fish purchasers and taxable fishermen, as it did prior to 1978. See RCW 75.32 (1962) (imposing a two percent "privilege fee" on purchasers and a two percent "catch fee" on fishermen). * * *

High Tide's presumably sincere suggestion that such a tax system obviates the "infirmity" which High Tide finds in Chapter 82.27 Wash. Rev. Code is, at best, naive.

As to the two percent privilege fee, the same perceived infirmity exists, for the fish purchaser is still faced

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[5]Note that this "infirmity", which High Tide attributes to the fish tax is, according to High Tide's argument, one which cannot be avoided. That is, according to High Tide, if part of the economic burden is passed on to treaty fishermen, treaty rights are violated. On the other hand, if the fish purchaser, absorbs the entire economic burden of the tax, in purchases from treaty fishermen, the purchaser's equal protection or Indian commerce clause guarantees are violated.

with the same two alternatives which supposedly create that infirmity. He will (1) either pass on part of the economic burden of the tax to treaty Indians and thereby, under High Tide's argument, violate treaty fishing rights or (2) according to High Tide, endure a diminution of Indian Commerce or Equal Protection Clause protections by paying more for fish purchased from treaty Indians than from their non-Indian counterparts, in dealings with whom the fish purchaser presumably will pass on part of the economic burden of the tax.

It seems evident that the "infirmity" which High Tide attributes to the fish tax may be "remedied" only by completely immunizing non-Indian fish purchasers from the fish tax, the very remedy High Tide sought before the courts below. Thus, High Tide's claim is, indeed, that of complete immunity from the fish tax with reference to fish purchased from treaty Indians, regardless of High Tide's effort to paint a more modest claim.

High Tide thus bases its claim of tax immunity on the fishing clause found in various treaties between Western Washington tribes and the United States,[6] the Indian Commerce Clause and the Equal Protection Clause of the Federal Constitution. Indeed, High Tide grounds much of its claim of immunity in an ill-defined meshing of these provisions.

C. ISSUES RAISED AND PASSED ON BELOW

High Tide raises before this Court a number of issues which either were not raised or were not passed upon by the Washington Supreme Court.

For example, the treaty fishing rights issue upon which High Tide so heavily relies in its Jurisdictional Statement is not in a proper posture for review by this Court. Although High Tide challenged the fish tax on the basis that it violated the fishing rights of treaty Indians,

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[6]See J.S. 1 for the text of the fishing clause relied upon by High Tide.

both the state trial court and the Washington Supreme Court refused to pass upon that issue, holding that High Tide lacked standing to raise it. See J.S. App. 8 where the Washington Supreme Court ruled:

> Plaintiffs do not have standing to challenge RCW 82.27 by asserting treaty rights of Indians.

The treaty rights issue, not having been properly raised or passed on by the court below, is not properly before this Court. *Illinois v. Gates*, 462 U.S. 213 (1983); See also Rule 15.1(g).[7]

High Tide also chastises the Washington Supreme Court for failing to consider a number of issues which High Tide never presented to that court and then goes on to explore those issues in its Jurisdictional Statement. For example, at J.S. 11, High Tide states:

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[7]This Court has often recognized that when:

> * * * the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street v. New York*, 394, U.S. 576, 582 (1969).

In order to make that affirmative showing, it would be incumbent upon High Tide to demonstrate that the court below was clearly wrong in holding that High Tide lacks standing to challenge the tax by asserting the treaty rights of Indians. No such showing appears in the Jurisdictional Statement.

The only reference to this issue is found in a single footnote. J.S. 12 n. 3. There, High Tide alleges that the willingness of the court below to decide High Tide's claim under the Indian Commerce Clause is irreconcilable with the court's ruling that High Tide is without standing to challenge the tax by asserting the treaty rights of Indian fishermen.

It seems clear to us that the court below was of the sound view that treaty rights are conferred only on Indians, whereas rights under the Indian Commerce Clause extend to Indians as well as those with whom they deal. Thus, the Washington Supreme Court's consideration of High Tide's Indian Commerce Clause claim is in no respect inconsistent or irreconcilable with its ruling that High Tide lacks standing to challenge the tax by asserting the fishing rights of treaty Indians.

We additionally suggest that High Tide lacks standing to raise the fishing rights of treaty Indians in this forum, under Article III and prudential limitations on the jurisdiction of this Court. *Valley Forge College v. Americans United*, 454 U.S. 464 (1982).

> The court did not address any of the issues or complexities raised by the existence of either tribal taxes on commercial fish sales or the credit provided under the Washington statute for taxes paid to other States but not to Indian tribes.

High Tide asserts that Indian tribes imposed such fish taxes on treaty Indians and fish purchasers and appends to its Jurisdictional Statement two examples of such taxes. See J.S. App. D, E.

High Tide does not identify any part of the record before the Washington courts where either of these issues was raised. That is because High Tide never raised them. Neither tribal tax contained in J.S. App. D nor E is part of the record below. In fact, both of those provisions postdate the period addressed in this litigation. High Tide never asserted the existence of any tribal taxes or alleged that it or its purchasers had been subjected to such taxes. Similarly, High Tide never raised any issue below concerning the credit provision contained in Chapter 82.27 Wash. Rev. Code during the period relevant to this appeal.[8]

These issues were not considered or passed on by the Washington Supreme Court simply because High Tide did not raise them. Consequently, they are not properly before this Court.

The only issues properly raised below and passed on by the Washington State Supreme Court and thus, properly before this Court, are whether Washington's fish tax comports with Indian Commerce Clause and Equal Protection Clause requirements. As we demonstrate in the argument portion of this motion, the Washington State Supreme Court was clearly correct in holding that the fish tax is valid under the Indian Commerce Clause and the Equal Protection Clause.

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[8]As High Tide eventually concedes in its Jurisdictional Statement, since 1985, Washington's tax scheme has allowed a credit for taxes previously paid on the same food fish to any other legally established taxing authority. J.S. 22 n. 14. Accordingly, this concern, which was not raised below, is not even a continuing one.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CLEARLY CORRECT.

A. THE FISH TAX DOES NOT DISCRIMINATE AGAINST INDIAN COMMERCE.

High Tide recognizes that the Indian Commerce Clause precludes states from imposing undue burdens on, or unfair discrimination against, Indian commerce. J.S. 19. We agree, as did the Washington Supreme Court. J.S. App. 11. That the preclusion of undue burdens or unfair discrimination against Indian commerce is the essence of the Indian Commerce Clause is recognized by the following language of this Court in *Washington v. Confederated Colville Tribes*, 447 U.S. 134, 157 (1980).

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. See *Moe v. Salish & Kootenai Tribes, supra*, at 481, n. 17. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian Commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State.

Just as Washington's imposition of a non-discriminatory tax on non-Indian purchasers of cigarettes from Indian smoke shops did not run afoul of Indian Commerce Clause requirements in *Colville*, so Washington's imposition of a non-discriminatory tax on non-Indian purchasers of fish from Indian fishermen comports with Indian Commerce Clause requirements here. There is no reason why the Indian Commerce Clause should be applied in this case differently from the way it was applied in *Colville*.

It also seems apparent that High Tide does not broach the Indian Commerce Clause for purposes of taking issue with the decision of the court below. That court applied existing Indian Commerce Clause standards and did so correctly. Rather, High Tide's Indian Commerce Clause

argument is an invitation to this Court to develop an entirely new approach to analysis of state taxes under the Indian Commerce Clause. That approach, according to High Tide, should focus on considerations such as the potential impact of state taxes on tribal sovereignty and the ramifications of multiple taxes. J.S. 19-20. High Tide further suggests that:

> This case presents an ideal opportunity for this Court to examine the Indian Commerce Clause and articulate standards for its application. * * * J.S. 18.

We see no need for this Court to depart from the currently prevailing contours of Indian Commerce Clause analysis, as most recently set forth and applied in *Colville*. Additionally, we can envision no case less appropriate for the examination in which High Tide invites this Court to engage. No Indian or Indian tribe is a party to this case. No evidence was presented below of any interference with tribal sovereignty or of the existence or potential impact of multiple taxes. In short, the circumstances which High Tide urges this Court to consider in developing new Indian Commerce Clause standards are not addressed on the record of this case.

B. WASHINGTON'S FISH TAX RAISES NO SIGNIFICANT EQUAL PROTECTION ISSUE.

High Tide presses an equal protection challenge to Washington's tax in spite of the fact that the tax is imposed at the same rate and measure on all purchasers of fish for commercial purposes. It contains no classification dependent upon the identity of the party from whom the fish are acquired.[9]

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[9]In this respect, High Tide's claim is in quite an odd posture. It is unlike the cases considered by this Court where a statutory shifting of the legal incidence of the tax in transactions involving tax immune entities, creates the classification upon which a discrimination claim is bottomed. *Washington v. United States*, 460 U.S. 536 (1983); *Colville*. Here, there is no shifting of the legal incidence of the tax. It is consistently imposed on the same entity. Nevertheless, an equal protection claim is pressed by High Tide.

Indeed, High Tide's equal protection argument is predicated not so much upon the statute, as it is upon High Tide's own notion that both of the following circumstances prevail with regard to Washington's tax, *i.e.*, that the statute (1) requires non-Indian fishermen to bear part of the economic burden of the tax, regardless of market conditions, and that (2) treaty fishing rights prohibit fish purchasers from passing on part of the economic burden to Indian fishermen. High Tide is wrong on both prongs of this argument.

As previously noted, High Tide challenged the validity of Wash. Rev. Code § 82.27.020(2) below, on the state law grounds that the "may deduct" language of the provision constituted an unlawful delegation of legislative authority. Rejecting that challenge, the Washington Supreme Court ruled that the "may deduct" language merely allows the parties liable for the tax to pass on to their sellers part of the economic burden of the tax, if market forces so allow. J.S. App. 6, 11. The statute in no respect mandates such a "pass on" or imposes liability for the tax on fish sellers, Indian or non-Indian.

As to demonstrating the relative economic power of fish sellers and fish buyers and thus, the ability of fish purchasers to pass on the economic burden of the tax to non-Indians, the record in this case is deficient.

The second prong of High Tide's equal protection argument is essentially based in a claim that the tax violates the fishing rights of treaty Indians.[10] As previously noted,

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[10]Further underscoring the rather bizarre posture of this equal protection claim is a record disclosing an inclination on the part of treaty fishermen to accept the same amount for their fish as that paid to non-Indians and a refusal by High Tide to abide such an equality of treatment.

Below, High Tide submitted a form affidavit from three treaty Indians. Clerk's Papers 201-206. Each contains the following statement:

> If HIGH TIDE SEAFOODS were to offer me a lower price for my salmon than HIGH TIDE SEAFOODS offers to non-treaty fisherman (sic) for their salmon, I would consider that as a violation of my treaty fishing rights and of my rights and privileges secured

that claim is not properly before this Court. It additionally is wrong for reasons we briefly address here.

High Tide cites *Tulee v. Washington*, 315 U.S. 681 (1942) as support for its argument that the fish tax violates the fishing rights of treaty Indians. In fact, High Tide goes so far as to suggest that the decision below "obviously and directly conflicts with *Tulee*." J.S. 13. That simply is not so.

Tulee concerned the validity of a Washington statute which required treaty Indians to obtain a license in order to fish. This Court ruled that the fishing rights of treaty Indians precluded the State from charging the Indian a fee for fishing. Here, by contrast, the State has imposed no fee whatsoever upon the Indian. The State has simply imposed a non-discriminatory tax on non-Indian purchasers, with respect to their commercial use of fish caught by both treaty Indian and non-treaty fishermen. High Tide, then, apparently cites *Tulee* for the proposition that imposition of a non-discriminatory tax on non-Indians, with respect to fish purchased from treaty Indians, violates Indian fishing rights. *Tulee* simply stands for no such proposition.[11]

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by the Constitution and Statutes of the United States of America.

High Tide, on the other hand, submitted an affidavit from one of its partners explaining High Tide's refusal to pass on part of the economic burden of the tax in the following fashion:

> High Tide Seafoods and its management, including myself, believe that such a reduction of the price it pays to treaty Indian fishermen would constitute a violation of the treaty Indian fishermen's treaty fishing rights and their rights and privileges secured by the Constitution of the United States of America. Clerk's Papers 208.

[11]High Tide's effort to bolster this argument by reliance on *Ramah Navajo School Board, Inc v. Bureau of Revenue*, 458 U.S. 832 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) fails. Those cases are readily distinguishable from the instant one in at least three vital respects. First, in both *White Mountain* and *Ramah*, this Court found that a pervasive scheme of federal regulation precluded imposition of the state's tax on non-Indians. Second, in neither case did the State seek to assess the tax for governmental functions it

High Tide's argument in this respect amounts to nothing more than an appeal for resurrection of the discredited theory that one who deals with Indians is entitled to an *implied* immunity from taxation, on the grounds that the economic impact of the tax may be borne by the Indian. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Colville*.

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are so unsubstantial as to require no further argument. Accordingly, this appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

DATED this 22nd day of January, 1987.

Respectfully submitted,

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performed on behalf of those upon whom either the incidence or the economic burden of the tax fell. Finally, in each case, the non-Indian taxpayer was engaged in business, within the boundaries of an Indian reservation. These circumstances simply do not obtain here. There is no pervasive scheme of federal regulation identified or involved in this case. Here, Indians as well an non-Indians benefit from the salmon enhancement efforts of the State, the funding of which is effectively tied to the fish tax. High Tide does not conduct its business within the boundaries of an Indian reservation.